

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIE LIVINGSTON HILL, <i>Petitioner-Appellant,</i> v. ERNEST C. ROE, Warden, <i>Respondent-Appellee.</i>
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No. 00-56480
D.C. No.
CV-99-11467-NMM
**ORDER AND
AMENDED
OPINION**

Appeal from the United States District Court
for the Central District of California
Nora M. Manella, District Judge, Presiding

Argued and Submitted
February 5, 2002—Pasadena, California

Filed July 29, 2002
Amended February 5, 2003

Before: Harry Pregerson, Pamela Ann Rymer, and
Thomas G. Nelson, Circuit Judges.

Opinion by Judge Pregerson

COUNSEL

Jerry D. Whatley, Santa Barbara, California, for the petitioner-appellant.

Erika D. Jackson, Deputy Attorney General, Los Angeles, California, for the respondent-appellee.

ORDER

The opinion filed July 29, 2002, and appearing at 298 F.3d 796 (9th Cir. 2002) is amended. The amended opinion is filed herewith.

The panel has voted unanimously to deny appellee's petition for rehearing and the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellee's petition for rehearing and the suggestion for rehearing en banc are denied.

OPINION

PREGERSON, Circuit Judge:

Willie Livingston Hill ("Hill") filed his petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254. The district court denied the petition as procedurally barred. We have jurisdiction under 28 U.S.C. § 2253, and affirm in part, vacate in part, and remand.

I. FACTUAL AND PROCEDURAL HISTORY

Hill was convicted of being a felon in possession of a firearm, in violation of California law. He appealed his convic-

tion to the California Court of Appeal, which affirmed the conviction. Hill then filed a petition for review with the California Supreme Court, which denied the petition. He then filed a state habeas petition, which was denied by the California Court of Appeal. The California Supreme Court denied Hill's habeas petition by issuing a letter that stated in full: "Petition for writ of habeas corpus is DENIED. (*In re Waltreus*, (1965) 62 Cal.2d 218, 225; *People v. Hill*, (1973) 9 Cal.3d 784, 786, 787.)"

Subsequently, Hill filed a petition for writ of habeas corpus in the federal district court. The court held that the California Supreme Court's citation to *In re Waltreus* did not bar federal court review. The court denied the petition, however, on the ground that, by citing *People v. Hill*,¹ the California Supreme Court based its denial of state habeas relief on an independent and adequate state procedural bar.

We find that the district court's ruling was correct as to *In re Waltreus*. In light of our recent decision in *Bennett v. Mueller*, 296 F.3d 752 (9th Cir. 2002), we vacate the district court's ruling.

II. PROCEDURAL DEFAULT

[1] Under the independent and adequate state grounds doctrine, federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). *See also McKenna v. McDaniel*, 65 F.3d 1483, 1488 (9th Cir. 1995). "Thus, the independent [and adequate] state grounds doctrine bars the federal courts from reconsidering the issue in the context of habeas corpus review as long as the state court explicitly invokes a state procedural bar rule as a separate basis for its

¹*People v. Hill* has no relation to petitioner Hill.

decision.” *McKenna*, 65 F.3d at 1488 (citing *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989)). Accordingly, we must determine whether the California Supreme Court’s denial of Hill’s state habeas petition with a citation to *In re Waltreus* and *People v. Hill* rested on an independent and adequate state procedural ground. If so, Hill is procedurally barred from pursuing his claims in federal court.

[2] California’s *In re Waltreus* rule provides that “habeas corpus ordinarily cannot serve as a second appeal.” 397 P.2d 1001, 1005 (Cal. 1965). Thus, under the *In re Waltreus* rule the California Supreme Court will not review in a habeas petition any claim raised on direct appeal. The California Supreme Court’s reliance on *In re Waltreus* does not, however, bar federal court review. In *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), the United States Supreme Court held that an *In re Waltreus* citation is neither a ruling on the merits nor a denial on procedural grounds and, therefore, has no bearing on a California prisoner’s ability to raise a federal constitutional claim in federal court. *Id.* at 805. *See also Forrest v. Vasquez*, 75 F.3d 562, 564 (9th Cir. 1996). Accordingly, we affirm the district court’s ruling that the California Supreme Court’s citation to *In re Waltreus* did not bar federal court review.

[3] California’s *People v. Hill* rule stands for the proposition that a petitioner may not raise an issue in a state habeas petition that has been litigated at trial and considered on direct appeal unless it relates to innocence or guilt. 512 P.2d 317, 319 (Cal. 1973). “To be ‘adequate,’ the state procedural rule [i.e., the *People v. Hill* rule] must be ‘strictly or regularly followed’ and ‘consistently applied.’ ” *La Crosse v. Kernan*, 244 F.3d 702, 704 (9th Cir. 2001) (citing *Morales v. Calderon*, 85 F.3d 1387, 1392 (9th Cir. 1996)). The district court concluded, without further discussion, that the *Hill* rule was well-established and consistently applied at the time of Hill’s default.

[4] However, since the district court's decision, we held in *Bennett v. Mueller*, 296 F.3d 752, 763 (9th Cir. 2002), as an issue of first impression that:

the ultimate burden of proving the adequacy of the state bar is upon the State of California Once the state has adequately pled the existence of an independent and adequate state procedural ground as an affirmative defense, the burden to place that defense in issue shifts to the petitioner. The petitioner may satisfy this burden by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule. Once having done so, however, the ultimate burden is the state's.

Because this is a new standard, we vacate the district court's ruling and remand for reconsideration of whether the procedural rule of *People v. Hill*, 512 P.2d 317 (Cal. 1973), is an adequate and independent ground in light of *Bennett*.

We AFFIRM the district court's conclusion regarding the *In re Waltreus* rule and VACATE the district court's conclusion regarding the *People v. Hill* rule. We REMAND to the district court for a determination whether the *People v. Hill* procedural rule is an adequate state ground under the burden of proof principles set forth in *Bennett*.

AFFIRMED in part; VACATED in part; and REMANDED.

Each side to bear its own costs.